# State of Wisconsin \ Government Accountability Board

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## MEMORANDUM

**DATE**: For the Meeting of March 12, 2012

**TO**: Members, Wisconsin Government Accountability Board

**FROM**: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:
Michael Haas, Staff Counsel

**SUBJECT**: Senate Recall Petitions – Evaluation of Challenges

## I. Introduction

This memorandum summarizes the legal arguments submitted by the four State Senators and the committees petitioning for their recall as part of the challenge process, and outlines Board staff's analysis and recommendations regarding those challenges. Section II of this memorandum addresses the three most significant legal challenges which are presented by all of the Senators, in terms of the number of signatures involved. Resolving these identical legal challenges is dispositive in determining the sufficiency of each of the Senate recall petitions because the remaining challenges to individual signatures, even if upheld, would not reduce the number of valid signatures below the minimum number required in each case. Board staff recommends that the Board reject each of these common legal challenges filed by the Senate incumbents as outlined below.

The Senators also filed additional challenges in categories which affect fewer numbers of signatures. Board staff did not review each individual signature which was challenged in these categories because there would be no impact on the sufficiency of the petitions. However, the Board may direct staff to conduct an individual review of these challenges if it so desires, and staff will be prepared to discuss the statutory basis of those challenges or the nature of the evidence necessary to sustain them.

On January 17, 2012, recall petitions were filed against State Senators Scott Fitzgerald, Terry Moulton, Van Wanggaard and Pam Galloway (collectively referred to herein as the "Senators" or "Senate officeholders"). The recall petitioners also filed a number of correcting affidavits with the petitions containing information which could be used to rehabilitate the validity of signatures which were struck during the staff's initial review or during the evaluation of challenges. On February 9, 2012, the four Senators filed challenges to the recall petitions filed against them. The petitioners filed rebuttal documents to the challenges on February 13, 2012, and the Senators filed a Joint Reply on February 15, 2012. All of these documents related to the challenge

process were filed timely, pursuant to Wis. Stat. §9.10 and the order of Dane County Circuit Court Judge Richard Niess.

To promote transparency and provide public access to the documents filed during this recall process, the Government Accountability Board has posted the petitions, challenges, rebuttals, and replies, including supporting affidavits, as links to the Board's website at http://webapps.wi.gov/sites/recall/default.aspx. To facilitate review by Board members, the materials included in the packet for this meeting exclude some of those documents but include those which outline the parties' legal arguments. While the Board may consult the other documents through the Board's website, staff believes including those voluminous documents with the Board materials was not necessary or crucial for the Board to determine the sufficiency of the recall petitions. The documents which are included in the Board packet are the following:

1. Memorandum of Law in Support of Senator Scott Fitzgerald's Written Challenge
2. Memorandum of Law in Support of Senator Van Wanggaard's Written Challenge
3. Memorandum of Law in Support of Senator Terry Moulton's Written Challenge
4. Memorandum of Law in Support of Senator Pam Galloway's Written Challenge
5. Recall Committees' Brief in Opposition to Written Challenges
6. Senators Fitzgerald, Wanggaard, Moulton and Galloway's Joint Reply (excluding exhibits related to individual signature challenges)

## II. Major Legal Challenges Filed by All Senators

### A. Signatures of Electors Outside of the Districts Created by Act 43

As the Board is aware, the effective dates included in redistricting legislation enacted last year have complicated the analysis of the proper Senate districts in which the recall elections must be held. The G.A.B. advised recall petitioners that petitions must be circulated and any recall elections would be certified in the districts which existed prior to the enactment of 2011 Act 43, based upon the plain language of that Act. At its meeting of November 9, 2011, the Board also affirmed staff's application of Act 43 and adopted a Guideline pertaining to its effective dates, which is attached. The first significant legal challenge filed by all of the Senate officeholders disputes that individuals residing in the legislative districts as they existed prior to the enactment of Act 43 are qualified to sign the respective recall petitions.

The Senators argue that a substantial number of the signatures on the recall petitions are of individuals who reside outside of the appropriate Senate District and are therefore invalid. This allegation is contained in the Written Challenges of Senator Scott Fitzgerald (as to 5,944 signatures); Senator Van Wanggaard (as to 12,935 signatures); Senator Terry Moulton (as to 6,261 signatures); and Senator Pam Galloway (as to 1,684 signatures); as well as in the supporting Affidavits of Daniel Romportl filed with each of the challenges.

In their Joint Reply, the Senate officeholders note that there is a constitutional and statutory requirement that a recall petition be signed by the qualified electors of any legislative district represented by the incumbent elective officer. *Wis. Const. Art. XIII, § 12 (intro) and Wis. Stat. §9.190(1)(a).* While acknowledging the Board's conclusion that any recall elections need to be conducted in the "old" Senate districts, the Senators contend that this is not the end of the

analysis and that the circulation of recall petitions must take place within the districts currently represented by the officeholders, in other words, the "new" Senate districts.

This challenge is based upon the Senators' argument that the process of circulating recall petitions is separate from the conduct of any recall elections, with the latter only occurring after a determination of sufficiency of the former. They note that the Board determined that the districts created by Act 43 were effective for purposes of constituent representation as of August 24, 2011. The Senators conclude, therefore, that even though the recall elections might be conducted in the old legislative districts, the recall petitions themselves must be signed by electors within the new districts, and any discussion of the proper districts for recall elections is moot until the Board determines that recall petitions are sufficient.

In their rebuttal to the Senators' challenges, the recall committees argue that the text of Act 43 does not permit a conclusion that the new legislative districts are in effect for the recall elections or the circulation of recall petitions. They rely on the language regarding effective dates in 2011 Act 43 and argue that the G.A.B.'s interpretation of the statute, on which the committees and petition signers relied, has already settled this question against the Senators.

Board staff agrees that the proper interpretation and application of the Act 43 effective dates are outlined in the October 19, 2011 and November 9, 2011 memoranda from Director and General Counsel Kevin Kennedy which are included as exhibits to the Senators' Joint Reply, as well as in the Guideline previously adopted by the Board. In addition, Board staff believes that Act 43 made no distinction between the proper legislative districts for circulating recall petitions and for conducting any recall elections which may result. As noted in Director Kennedy's memoranda, 2011 Act 43 § 10(2) states that the legislation creating new legislative districts "first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election." None of the current Senate recall petitions relate to offices that are to be filled or contested concurrently with the 2012 general election.

The Board's previous analysis regarding this issue did not focus on distinguishing the circulation of petitions from the conduct of recall elections. Board staff disagrees, however, with the Senate officeholders' assertions that qualified electors of a district are determined by the Board's conclusion that August 24, 2011 was the effective date of Act 43 for purposes of constituent representation. The Legislature did not make that distinction in the language of Act 43 and the Board is not free to create it. The constitutional and statutory language authorizing the qualified electors of "any legislative district" to petition for recall of an incumbent must be read in light of the language the Legislature chose to use in Act 43 to establish its effective dates.

Furthermore, neither Article XIII, §12 of the Wisconsin Constitution nor the provisions of Wis. Stat. § 9.10 contain any support for the notion that the qualified electors for purposes of circulating a recall petition may be different from the qualified electors who are eligible to vote at the ensuing recall election. To the contrary, the constitutional and statutory language outline a full process from registration of the recall petitioner to circulation of recall petitions to voting at an election, which involves the participation of the "qualified electors" of the jurisdiction.

Act 43 was enacted shortly after the completion of nine recall elections involving State Senators of both parties, and therefore it seems unlikely that the Legislature was unaware of the impact of its separate effective dates governing representation and elections. Act 43 states that the new

districts *first apply*, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election. As outlined in Director Kennedy's October 19, 2012 memorandum, that specific language seems to indicate, logically and as a matter of statutory interpretation, that the new districts *do not apply* to special or recall elections for offices filled or contested prior to November 6, 2012. The "old" districts, therefore, were not extinguished by the enactment of Act 43 for such special or recall elections, and continue to be existing districts for those purposes. By delaying the Act's effective date for recall and special elections, the Legislature defined the pool of electors who are qualified to exercise the right of recall pursuant to Article XII, §12 of the Wisconsin Constitution and Wis. Stat. § 9.10(1)(a).

In addition to comporting with the plain language of Act 43, the Board's interpretation is supported by holdings in two recent court cases, both of them ultimately reaching the U.S. Supreme Court. In *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1870222 (S.D. MS 2011), a federal district court declined to order the Mississippi Legislature to enact redistricting legislation prior to 2012, the end of the ten-year period from the previous reapportionment. *MS State Conf. of NAACP, et al. v. Barbour*, et al., 2011 WL 1870222 (S.D. MS 2011), Slip Copy at 7. In doing so, the Court noted that all parties acknowledged that the current legislative districts were malapportioned based on the 2010 census data, but that states operate under the long-established legal fiction that redistricting plans are constitutionally apportioned throughout the entire succeeding decade, until a new plan is adopted. *Barbour* at 6, 8. The U.S. Supreme Court summarily affirmed the district court decision. *MS State Conf. of NAACP, et al. v. Barbour, Gov. of MS, et al.,*2011 WL 511830, 80 USLW 3059 (S.Ct. 2011).

In the district court's *Barbour* decision and the more recent U.S. Supreme Court decision in *Perry v. Perez*, 565 U.S. ____ (2012), courts have given deference to legislative decision making regarding redistricting. Perry v. Perez, 565 U.S. ___ at 2, 4 (2012); *Barbour*, 2011 WL 1870222 (S.D. MS 2011), Slip Copy at 7 ("reapportionment is primarily a matter for legislative consideration and determination.) In Act 43, the Legislature provided that the previous legislative districts would continue to be used to conduct special and recall elections for a limited period of time. Absent further legislative action or a court ruling, the Board must respect that legislative determination.

The effective date provisions of Act 43 create a situation in which incumbent legislators may be answerable to two overlapping sets of constituents, namely 1) residents of the newly-created districts for which their legislative representation began August 24, 2011 and who would be entitled to vote for that officeholder in 2014, and 2) residents of the pre-Act 43 districts who voted for the office in 2010 and who retain "jurisdiction" over the officeholder for purposes of recall for the duration of the period until the November 6, 2012 General Election. That consequence is compelled by the plain language of Act 43, however, and the Board does not have the authority to alter that result.

The Board's guidance to the Legislature in response to questions raised about the Act's effective date for purposes of representation has enabled current Legislators to provide services to constituents of the new districts, while also permitting them to respond to inquiries from constituents in the old districts. The Joint Committee on Legislative Organization (JCLO) has affirmed this interpretation through a motion adopted regarding the expenditure of public funds, which is attached as Exhibit A. In short, the policy currently authorizes Members of the Legislature to expend funds to provide constituent services to individuals residing in either the pre-Act 43 districts or in the new legislative districts.

As a result of the JCLO policy determination, the following statement which appears on the Legislature's "Who Are My Legislators?" website above the names and photographs of legislators representing a specific constituent under both the old and new legislative districts:

> The Wisconsin Government Accountability Board has indicated that the legislative districts established in 2002 remain in effect for election purposes and that the legislative districts established in 2011 Wisconsin Act 43 are also in effect for purposes of providing services to constituents.
>
> The Joint Committee on Legislative Organization has adopted a policy authorizing the provision of constituent services to individuals residing in either set of legislative districts.
>
> Each of the legislators listed below is authorized to provide constituent services for the address provided….

In addition, as Director Kennedy noted in his memorandum of October 19, 2011, a special election was held in the 95th Assembly District last fall. That election was ordered by the Governor on September 2, 2011, following the enactment of Act 43. Pursuant to 2011 Executive Order 41 and the same language in dispute here, the special election was conducted under the district lines in effect before passage of Act 43. No distinction was made in the Executive Order between the residents who were qualified electors of the district for purposes of signing nomination papers and for purposes of voting in the special election. No candidate or representative of either political party objected to the circulation of nomination papers or conduct of the special election under the pre-Act 43 district boundaries.

Furthermore, in several ongoing lawsuits challenging the redistricting legislation, it is the legal position of the Board and the State of Wisconsin, being represented by the Attorney General, that recall and special elections conducted prior to the 2012 General Election must be conducted using the legislative districts which existed prior to the enactment of Act 43.

Because of the plain language of Act 43's effective date provisions, the challenges of the Senate officeholders alleging that petition signatures are invalid if the signer resided in the pre-Act 43 legislative district but not in the new districts created by that Act do not demonstrate a failure to comply with statutory requirements. For the reasons described above, Board staff recommends that the Board also reject those legal challenges to the recall petitions.

**Recommendation – Reject all challenges of the Senate officeholders which are based on the signer residing outside of the new 29th Senate District.**

B. Signatures Collected Prior to or on the Date of Registration

The Senators argue that there is reason to believe certain signatures were collected prior to registration, in violation of Wis. Stat. §9.10(2)(d), which states that "No petitioner may circulate a petition for the recall of an officer prior to completing registration." Citing §GAB 6.02, the officeholders contend that committee registration is not complete "until a GAB representative reviews the registration statement and accepts it." Senators' Memoranda of Law in Support of Written Challenges, Section V.; Senators' Joint Reply, Section II.

Although the Senators do not identify any of the signatures allegedly collected prematurely, they argue that this is due to the Recall Committees' failure to indicate the time certain signatures were made. According to the Senators' Joint Reply, the Recall Committees made no assertions that they waited until registration was complete before circulating petitions, and they submit evidence in the form of newspaper reports of "midnight signing parties and 'pajama parties,'" suggesting that many signatures were collected in the early morning of November 15, 2011.

In their respective Written Challenges, each Senator alleges that signatures were collected prior to the petitioner completing registration, contrary to Wis. Stat. §9.10(2)(d), and that those signatures must be disregarded. Senator Scott Fitzgerald's Written Challenge at 7; Senator Van Wanggaard's Written Challenge at 6; Senator Terry Moulton's Written Challenge at 6; Senator Pam Galloway's Written Challenge at 6. The Senators note that the paper copies of the recall committee registrations were time-stamped by the G.A.B. at mid-morning on November 15, 2011 (in the case of the committee opposing Senators Fitzgerald) or on November 16, 2011 (in the case of the committees opposing Senators Wanggaard and Galloway) or on November 17, 2011 (in the case of the committee opposing Senator Moulton). Based on this evidence Senator Fitzgerald challenges at 877 signatures; Senator Wanggaard challenges 2,404 signatures; Senator Moulton challenges 4,155 signatures; and Senator Galloway challenges 1,576 signatures.

The recall petitioners argue that the Senators do not present sufficient evidence to support their requests to strike any signatures dated on or after November 15, 2011. They contend that Wis. Stat. §9.10 delineates a time period of circulation that includes the day of registration. In support of this interpretation, they cite the GAB's correspondence to the recall committees, which indicated that November 15, 2011 was the first day of the circulation period, and January 14, 2012 was the last day that signatures could be collected. The Committee also argues that under the Administrative Code and Wisconsin case law, the invalidity of one signature shall not affect the validity of any other signatures on the petition. §§ GAB 2.07(3)(a), 2.11(1), Wis. Adm. Code; *Stahovic v. Rajchel*, 122, Wis. 2d 370, 363 N.W. 2d 243 (Ct. App. 1984).

According to the Committees, the Senators did not dispute any individual signatures, but rather all of those collected on November 15, 2011, as well as on November 16 and 17, 2011 in the case of three of the recall committees. The Committees further argue that the Senators provide no evidence to support their belief that any of the signatures were collected prior to registration being completed, and, therefore, their challenges must be denied.

In the opinion of Board staff, this category of challenges should be denied for several reasons. Most fundamentally, the Senate officeholders have not identified any specific signatures that they challenge or offered any evidence that a specific individual signed a recall petition prior to registration being completed. If they had done so with clear and convincing evidence, the burden may have shifted to the petitioners to rebut the evidence. The newspaper articles submitted in support of the challenges primarily describe events at which individuals gathered to collect signatures and organize recall efforts against Governor Walker. None of the reports identify any individual who signed a recall petition against any of the Senators at any specific time, much less prior to the committee completing registration.

In addition, the Senators' challenges focus on the time-stamp shown on the paper copies of the committee registration forms, which are attached Exhibits B through E. However, three of the four Senate recall committees (opposing Senators Wanggaard, Moulton, and Galloway registered

electronically using the Board's Campaign Finance Information System (CFIS) shortly after midnight on November 15, 2011. As indicated on the spreadsheet attached as Exhibit F, the Wanggaard recall petitioner registered electronically at 12:04 a.m.; the Galloway recall petitioner did so at 12:19 a.m., and the Moulton petitioner followed at 12:26 a.m. on November 15, 2011. The recall committee opposing Senator Fitzgerald registered in person at the G.A.B. office at 9:32 a.m. as reflected by the time-stamp shown on Exhibit B. This information was provided to counsel for the Senators at his request on February 8, 2012.

As to the committees which filed electronically on CFIS, § GAB 1.41(1), Wis. Adm. Code, provides that

> Where a requirement is imposed for the filing of a registration statement no later than a certain date, the requirement may be satisfied either by actual receipt of the statement by the prescribed time for filing at the office of the filing officer, or by filing a report with the U.S. post service by first class mail with sufficient prepaid postage, addressed to the appropriate filing officer, no later than the date provided by law for receipt of such report.

While the petitioners were barred from collecting signatures prior to registration, submitting the required form electronically through CFIS is considered completion of registration, provided that is complete. There is no legal requirement for the registration to be acknowledged by the G.A.B. in order for the registration process to be completed, unless the form is insufficient as to essential form, information or attestation, in which case the registration shall be rejected by the filing officer. § GAB 6.02(1), Wis. Adm. Code. If the registration statement is insufficient or incomplete but substantially complies with the law, it is to be accepted by the officer who shall promptly notify the registrant that the form must be completed within 15 days. § GAB 6.02(2), Wis. Adm. Code. None of the petitioners' registration statements were insufficient as to essential form, information or attestation and therefore registration was completed upon their filing through CFIS.

For these reasons, the Senators' challenges to signatures allegedly collected prior to the respective committee's registration should be denied in full. The information on the petition is presumed to be valid, and the officeholders bear the burden of presenting clear and convincing evidence to defeat that presumption. Wis. Stats. §§ 9.10(2)(g) and (h); §§GAB 2.05(4) and 2.11(1), Wis. Adm. Code. No evidence has been presented to demonstrate that the petitioners or specific petition signers failed to comply with statutory or other legal requirements regarding the committee registration statements. Finally, in the event that evidence were presented to establish that a specific individual signed a recall petition prior to the petitioner completing registration, such a fact does not automatically invalidate other signatures on the petition. §§ GAB 2.07(3)(a), 2.11(1), Wis. Adm. Code; *Stahovic v. Rajchel*, 122, Wis. 2d 370, 363 N.W. 2d 243 (Ct. App. 1984).

**Recommended Motion: Deny all challenges of the Senate officeholders which are based on the individuals allegedly signing the petitions prior to the recall committees completing registration with the Board.**

C. Signatures Analyzed by Third Party

Each of the Senate officeholders' Written Challenges request that the Board accept and evaluate challenges submitted by "Verify the Recall," a joint effort of two nonprofit corporations, Wisconsin GrandSons of Liberty and We the People of the Republic. The Senators' Written Challenges attempt to incorporate the results of a Citizen Verification Process conducted under the umbrella of Verify the Recall "to the extent those results reveal additional valid grounds for challenging the sufficiency of the Recall Petition." The Challenges indicate that the Senators believe the results of the Citizen Verification Process would be made publicly available on the date the Challenges were filed. The Senators argue that existing campaign finance laws prohibit the two nonprofit organizations from directly providing results of the Citizen Verification Process or otherwise coordinating efforts with the Senators. They also allege that Board staff has referred individuals who believe their names were improperly signed to any of the recall petitions to the Verify the Recall organization, and therefore Board staff has prevented information about potential challenges from being shared directly with the Senators.

The recall petitioners do not respond to the Senators' request or arguments regarding challenges that might be filed through the Verify the Recall effort.

At its meeting of February 7, 2012, the Board discussed the request of Verify the Recall or other organizations to submit challenges on behalf of Senate officeholders. The Board noted that there is no statutory basis for the Board to accept challenges or rebuttal documents from any party other than the officeholders and the petitioners. In fact, Wis. Stat. § 9.10(3)(b) states only that "Within 10 days after the petition is offered for filing, the officer against whom the petition is filed may file a written challenge" with the filing officer. The deadline for the Senators to file written challenges was February 9, 2012.

While Board staff has indicated the Board is free to review any information submitted by the public as a check on its own work, or to assess whether its procedures could be improved, staff continues to believe that the Board is not authorized to accept challenges of recall petition signatures from any party other than the officeholder. In addition, the issue is moot because the Verify the Recall organizations did not file any written challenges with the Board by the deadline of February 9, 2012.

It should be noted that Verify the Recall is not prohibited from sharing information or coordinating efforts with the Senators under Wisconsin campaign finance laws; they are only prohibited from providing their services to the Senator's campaign committees without charge because of their corporate status. Wis. Stat. § 11.38 prohibits foreign and domestic corporations from making a political contribution to a candidate or political committee. Board staff advised representatives of Verify the Recall that the organization could share the results of its efforts with the Senators if those results were purchased. Apparently there was no effort or agreement to share that information in a way that would comply with the campaign finance laws.

For these reasons, Board staff recommends that the Board deny any challenges filed by the Senators which are based on the assertion that information produced by Verify the Recall is incorporated into the Written Challenges.

**Recommended Motion: Deny all challenges filed by the Senators which are based on the assertion that information produced by Verify the Recall is incorporated into the Written Challenges.**

D. Signatures with the Same or Similar Handwriting

Each of the Senators also challenge a number of signatures because multiple signatures "appear in the same handwriting," citing Wis. Stat. §9.10(2)(e)(j), which states that "If a challenger demonstrates that someone other than the elector signed for the elector, the signature may not be counted, unless the elector is unable to sign due to physical disability and authorized another individual to sign in his or her behalf."

The Senators' Written Challenges offer no evidence beyond the sworn statements of the Senators and Daniel Romportl that "multiple signatures appear in the same handwriting." Information on a recall petition is entitled to a presumption of validity pursuant to §§ GAB 2.05(4) and 2.09(1), Wis. Adm. Code. Absent any sworn affidavits containing first-hand knowledge, the Senators have failed to rebut the presumption of validity and satisfy the clear and convincing burden of proof pursuant to Wis. Stat. §9.10(2)(g) and §§ GAB 2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code. Therefore, Board staff recommends that the Board deny any challenges filed by the Senators which are based solely on the assertion that multiple signatures appear in the same handwriting.

**Recommended Motion: Deny all challenges filed by the Senators which are based solely on the assertion that multiple signatures appear in the same handwriting.**

## III. Conclusion

The above analysis and recommendations dispose of most of the major categories of challenges filed by each of the Senators. They present other categories of challenges for which Board staff has not conducted an in-depth evaluation of the legal bases or the quality of the evidence presented. Resolving the challenges described above as recommended is dispositive in determining the sufficiency of each of the Senate recall petitions.